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## ORDER

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petitioner's motion for the appointment of counsel (ECF No. 186), and petitioner's motion for leave to depose Thomas M. Kerr (ECF No. 176).

### **I. Motion for Leave to File Motion to Dismiss**

Respondents argue that granting them leave to file a motion to dismiss will allow them to raise the defenses of exhaustion and procedural default before the court reaches the merits of the petition. According to respondents, proceeding in such a fashion will facilitate a clear record in this case. Petitioner opposes the motion, arguing that respondents' actions have consistently delayed this case. (ECF No. 189.) Petitioner contends that the court should deny respondents' motion and require them to file an answer.

Given the number of grounds raised in the third amended petition and the supplement to the third amended petition, and the length of argument supporting each, the court finds that allowing respondents to file a motion to dismiss is appropriate and serves the interests of justice. Accordingly, respondents are granted leave to file a motion to dismiss and shall file a motion to dismiss within sixty (60) days of the date of this order.

In opposing respondents' motion for leave, petitioner moves for sanctions. (ECF No. 190.) There is no basis for sanctioning respondents, and thus, the court denies petitioner's motion.

### **II. Motion for the Appointment of Counsel**

Petitioner moves for the appointment of counsel based on the difficulty he is encountering in litigating this action *pro se* while incarcerated at High Desert State Prison. Petitioner argues that the court should appoint counsel in the interests of justice because this case is complex.

There is no constitutional right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993). The decision to appoint counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). However, counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is a person of such limited education as to be incapable of fairly presenting his claims. *See Chaney*, 801 F.2d at 1196; *see also Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970).

1 As the court has previously noted, petitioner's papers are clear and demonstrate his ability to  
2 advocate on his own behalf. The court reaffirms its position that petitioner is able to litigate this case  
3 effectively without the assistance of counsel. Therefore, in exercising its discretion, the court denies  
4 petitioner's motion for the appointment of counsel.

5 **III. Motion for Leave to Depose Thomas M. Kerr**

6 Petitioner seeks leave to depose his stepfather, Thomas M. Kerr. Petitioner states that Mr. Kerr  
7 is an important witness whose testimony is relevant to petitioner's actual innocence, alibi defenses, juror  
8 misconduct, and the ineffective assistance of counsel claims. Petitioner states that Mr. Kerr is suffering  
9 from a serious, life-threatening illness. Respondents did not oppose the motion.<sup>2</sup>

10 Upon review of petitioner's papers and in light of the severity of Mr. Kerr's condition, the court  
11 concludes that the interests of justice are best served by allowing petitioner to telephonically depose Mr.  
12 Kerr. Because of the unique circumstances presented here, the court exercises its inherent authority and  
13 equitable powers in granting petitioner's request to allow him to preserve evidence. In doing so, the  
14 court expresses no opinion of any kind on the merits of petitioner's petition currently pending before this  
15 court. Moreover, Mr. Kerr's deposition testimony may not be used in support of the grounds in  
16 petitioner's third amended petition or his supplemental petition. *See Cooper-Smith v. Palmateer*, 397  
17 F.3d 1236, 1241 (9th Cir. 2005) (holding that to expand the record under Rule 7 of the Rules Governing  
18 § 2254 cases a petitioner must show "that his claim was based either on a new retroactive rule of  
19 constitutional law, or on 'a factual predicate that could not have been previously discovered through the  
20 exercise of due diligence.'" (quoting 28 U.S.C. § 2254(e)(2))). Additionally, Mr. Kerr's deposition shall  
21 be limited to one issue: Mr. Kerr's observation and recollection of petitioner's physical condition at the  
22 time of the offenses of which petitioner was convicted. Specifically, petitioner's alleged "severe ankle  
23 injury with swelling and possible dislocation . . . ." (ECF No. 176 at 22.)

24 Mr. Kerr, counsel for respondents, and counsel from the Clark County District Attorney's Office  
25 may appear for the telephonic deposition in a courtroom to be determined at the Lloyd D. George United

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27 <sup>2</sup> Petitioner's motion is entitled "Notice of Terminal Illness and a Need for Depositions of Key  
28 Witnesses." In liberally construing this *pro se* filing, as the court is obligated to do, the document is  
properly considered a motion. However, petitioner is explicitly warned that documents seeking court  
actions must be filed as a "motion" and not a "notice" in the future.

1 States Courthouse located at 333 Las Vegas Blvd. South, Las Vegas, NV 89101. Counsel for  
2 respondents shall coordinate with petitioner and/or correctional officials at petitioner's current location  
3 or incarceration, Mr. Kerr,<sup>3</sup> counsel from the Clark County District Attorney's Office, and Melissa  
4 Jaime, Courtroom Administrator (phone: 702/464-5415) to schedule the time and date of the deposition.  
5 Petitioner will not be transported to the court but will appear telephonically. The deposition must be  
6 scheduled within sixty days of the date of this order. The court will provide a court reporter who will  
7 furnish three copies of the transcript. Petitioner, respondents, and the Clark County District Attorney's  
8 Office shall each receive one copy of the transcript. In the interests of justice, the court authorizes  
9 payment for the deposition and deposition transcripts under the Criminal Justice Act, 18 U.S.C. §  
10 3006A(e).

11 At the telephonic deposition, petitioner shall have up to one (1) hour to examine Mr. Kerr.  
12 Respondents and the Clark County District Attorney's Office shall, collectively, have up to one (1) hour  
13 to examine Mr. Kerr. The court reiterates that the questioning of Mr. Kerr shall only pertain to Mr.  
14 Kerr's observation and recollection of petitioner's alleged physical condition (ankle injury) at the time  
15 of the offenses of which petitioner was convicted, as explained in this order, *supra*.

#### 16 **IV. Conclusion**

17 **IT IS THEREFORE ORDERED** that respondents' motion for leave to file a motion to dismiss  
18 (ECF No. 185) is **GRANTED**. Respondents shall file their motion to dismiss within **sixty (60) days**  
19 of the date of this order.

20 **IT IS FURTHER ORDERED** that petitioner's motion for sanctions (ECF No. 190) is  
21 **DENIED**.

22 **IT IS FURTHER ORDERED** that petitioner's motion for the appointment of counsel (ECF No.  
23 186) is **DENIED**.

24 **IT IS FURTHER ORDERED** that petitioner's request to depose Thomas M. Kerr (ECF No.  
25 176) is **GRANTED** with the limitations and specifications provided in this order.

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28 <sup>3</sup> Mr. Kerr's contact information can be located at page 2 of ECF No. 176.

1       **IT IS FURTHER ORDERED** that the clerk of court **SHALL SERVE** this order on the Clark  
2 County District Attorney's Office, Criminal Division, 200 S. Third St., Las Vegas, NV 89155.

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4       DATED this 20th day of July, 2011.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE